No. 221

In the Supreme Court of the United States

October Term, 1949.

SKELLY OIL COMPANY, STANOLIND OIL AND GAS COMPANY AND MAGNOLIA PETROLEUM COMPANY,
Petitioners,
vs.
PHILLIPS PETROLEUM COMPANY, *Respondent.*

ANSWER OF RESPONDENT TO ADDITIONAL ARGUMENT OF PETITIONER MAGNOLIA PETROLEUM CO.

DON EMERY,
RAYBURN L. FOSTER,
H. K. HUDSON,
GEORGE L. SNEED,
Phillips Building,
Bartlesville, Oklahoma;

HARRY D. TURNER,
S. E. FLOREN, JR.,
1211 First National Building,
Oklahoma City, Oklahoma,
EUGENE O. MONNETT,
JACK N. HAYS,
Philtower Building,
Tulsa, Oklahoma,

Attorneys for Respondent, Phillips Petroleum Company.

December, 1949.

TABLE OF CASES.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1949.

No. 221

SKELLY OIL COMPANY, STANOLIND OIL AND GAS COMPANY AND MAGNOLIA PETROLEUM COMPANY,

Petitioners,

vs.

PHILLIPS PETROLEUM COMPANY, *Respondent.*

ANSWER OF RESPONDENT TO ADDITIONAL ARGUMENT OF PETITIONER MAGNOLIA PETROLEUM CO.

On the day before this cause was expected to be reached for oral argument, there was filed by the petitioner Magnolia Petroleum Company what it termed an additional argument belatedly asserting here as error the overruling of its motion to quash service of process upon it and to dismiss for alleged improper venue. This, in an attempt to avoid an affirmance of the judgment as to Magnolia based upon diversity of citizenship between it and the respondent in the event this Court should hold that no Federal question exists so as to uphold jurisdiction as to all petitioners (see pages 54 to 56 of brief of respondent).

Inasmuch as the limited time of oral argument did not permit mention of the additional argument of Magnolia, the

respondent takes this means of briefly commenting upon it, for it is felt that the argument does not require more.

The alleged error of the trial court in overruling the motion attacking process and venue was not assigned as error in the petition for writ of certiorari here nor was it suggested in that petition or in the brief in support thereof. The petitioner's position concerning it was abandoned in the Court of Appeals for the alleged error was neither briefed nor argued in that court. It is submitted that under the rules of this Court the alleged error is not open for consideration. Rule 38, par. 2.

Although it is believed that the foregoing should amply dispose of the argument, the respondent further submits that the assertion of Magnolia that the trial court incorrectly overruled its motion is without merit. In endeavoring to support its argument, Magnolia suggests that the contract was executed in Texas and states that Magnolia wired its notice of termination from that state. Magnolia signed the contract in Texas but it was not consummated until executed by the respondent at its office in Bartlesville, Oklahoma, in the Northern District of Oklahoma. Upon being signed by the respondent in that district an executed copy of the contract was there deposited in the mail addressed to Magnolia (R. 233). It was therefore in Oklahoma that "final assent" was given; it was in Oklahoma that the contract was consummated. *American Body & Trailer Co.* v. *Higgins*, 195 Okl. 349, 156 P. (2d) 1005, 1008; *Gas Appliance Sales Co.* v. *W. B. Bastian Mfg. Co.*, 87 Cal. App. 301, 262 Pac. 452, 455. The termination notice was not given in Texas. The telegraph agency through which the notice was sent was not the agent of the respondent. Quite on the contrary, the wire as it states was sent "Under the terms of Section Two, Article Two" of the contract.

.7) The portion of that section significant here provides follows (R. 38):

"* * * Seller (Magnolia) shall have the right to terminate this contract by written notice to Buyer (Phillips) *delivered to Buyer* at any time after December 1, 1946, but before the issuance of such certificate."

o Section 2, Article XV, provides when notices are to effective as follows (R. 53):

"* * * *The originating notice to be given under any provision hereof shall be deemed given only when received by the party to whom such notice is directed* and the time for such party to give any notice in response thereto shall run from the date the originating notice is received. * * *"

e notice of termination was given in Oklahoma and the rthern District was the correct forum under the statute erred to by Magnolia. See *American Body & Trailer Co., ra; Tuloma Oil Co.* v. *Johantgen*, 107 Okl. 92, 230 Pac. ; and *Consolidated Fuel Co.* v. *Gunn*, 89 Okl. 73, 213 Pac. . The implication of Magnolia that the rule in *Nierbo , et al.*, v. *Bethlehem Shipbuilding Corp., Ltd.*, 308 U. S. , applies only in diversity cases and the argument that rule should not be extended to suits which are not rec- ized in state courts were repudiated by this Court in *ahoma Packing Co.* v. *Oklahoma Gas & Electric Co., et* 309 U. S. 4. That case was one of which the Federal urt had jurisdiction because it arose under the Constitu- or laws of the United States (see the case below, 100 (2d) 770, 773) and was a suit that could not, by stat- , be maintained in a state court.

The petitioner Magnolia apparently recognizes (see e 15 of its additional argument) the rule which respond- asserts (pages 54 to 56 of its brief) and seeks to avoid

it by saying that it was prejudiced. But the only prejudice which Magnolia suggests is the alleged error in overruling its motion to quash. *Jurisdiction over the person of Magnolia or venue as to it was in no way dependent upon or connected with the fact that other claims against the other petitioners were joined with the claim against Magnolia, and the trial court did not so rule.* The prejudice which is spoken of in *Camp* v. *Gress,* 250 U. S. 308, and similar cases cited by respondent is prejudice by virtue of *a joinder* with other parties over whom the court has no jurisdiction. The argument would seem merely to emphasize the complete lack of prejudice to Magnolia by reason of the claim against it having been joined under Rule 20(a) with like claims against the other petitioners.

The respondent maintains that the trial court had jurisdiction as to all petitioners because the suit is one arising under the Constitution or laws of the United States as that jurisdictional clause has been construed and applied by this Court and the judgment should be affirmed as to all petitioners; but in any event jurisdiction obtained as to Magnolia because of diversity and the judgment should be here affirmed as to it.

Respectfully submitted,

DON EMERY,
RAYBURN L. FOSTER,
H. K. HUDSON,
GEORGE L. SNEED,
Phillips Building,
Bartlesville, Oklahoma;

HARRY D. TURNER,
S. E. FLOREN, JR.,
1211 First National Building,
Oklahoma City, Oklahoma,
EUGENE O. MONNETT,
JACK N. HAYS,
Philtower Building,
Tulsa, Oklahoma,

Attorneys for Respondent, Phillips Petroleum Company.

December, 1949.